United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2023

ORIGINAL

To be argued by
HOBART L. BRINSMADE

United States Court of Appeals
FOR THE SECOND CIRCUIT

SECURITIES & EXCHANGE COMMISSION,
Plaintiff-Appellee,

against

CAPITAL COUNSELLORS, INC., CAPITAL ADVISORS, INC.,
J. IRVING WEISS, ABRAHAM B. WEISS,
Defendants.

CONBOY, HEWITT, O'BRIEN & BOARDMAN,
Appellant,

SYDNEY B. WERTHEIMER,
Receiver-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF CONBOY, HEWITT, O'BRIEN & BOARDMAN, APPELLANT

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A. Reply to the Memorandum of the Securities and Exchange Commission, Plaintiff-Appellee

The Securities and Exchange Commission (Commission) does not question the statement in Appellant's Brief (p. 4) that the Courts for at least ninety years have held that attorneys' fees contracted for prior to an equitable receivership and rendered in opposing the appointment of the receiver are payable out of the receivership estate in the discretion of the District Court. It recognizes the fairness

of the doctrine (Commission Brief, p. 2) that "unless the attorneys for a defendant resisting receivership are assured of being able to secure payment for their services from the receiver, and on a priority basis, it will be difficult for such defendants to obtain competent counsel".

It argues, however (Commission Brief, pp. 2-3), that the Bankruptcy rule denying such fees is fairer because of two countervailing factors: (a) that the appellant law firm would receive a preference over brokerage customer creditors and (b) the Weiss brothers alone could have benefited from the legal services rendered.

With respect to item (a), there is no rule of law that brokerage customer creditors in an equitable receivership enjoy any preferential claim over other creditors. Certainly they are not preferred to administrative creditors.

With respect to item (b) the disallowance of appellant's claim will not result in any additional burden or punishment of the Weiss brothers since it is clear (58a-59a*) that no legal fee could be collected from them. It is by no means certain that the defeat of the receivership would have solely benefited the Weiss brothers (see p. 4 *infra*). But clearly the Court benefited from this being an adversary proceeding which it would not have been had defendants not had competent counsel. Courts are not equipped *sua sponte* to protect the rights of litigants not represented by counsel, especially where complicated financial transactions requiring diligent research into the law and facts are presented.

Finally, the Commission argues (Commission Brief pp. 13-14) that appellant has no claim because the temporary restraining order of March 25, 1971 prohibited the Weiss brothers from "engaging in any transactions or undertaking or creating any contractual commitment". This prohibition does not purport to (nor could it) annul and cancel existing binding contracts. It only applied to con-

* References are to pages of the Appendix.

tracts made after March 25, 1971. Appellant's retainer agreement and the basis of its claim was entered into in December 1970, long before the temporary restraining order. Neither the District Court, the Commission nor the Receiver ever objected to Appellant continuing to represent the corporate defendants after March 25, 1971, despite the restraining order.

B. Reply to the Brief of Receiver-Appellee

Although the Receiver originally took the position that Appellant based on *Barnes* v. *Newcomb*, 80 N.Y. 108 (1882) and *Robinson* v. *Mutual Reserve Life Ins. Co.*, 162 Fed. 794 (S.D.N.Y. 1908) was entitled to an allowance out of corporate funds (60a-61a), *Securities & Exchange Comm'n* v. *Alan F. Hughes, Inc.*, 481 F.2d 401 (2d Cir. 1973) has led him to the belief that *Barnes* and *Robinson* do not apply because the defense here interposed was against a claim of fraud and, in any event, was "captious and vexatious" (Receiver-Appellee's Brief p. 18). This change of position is all the more curious since the Receiver was fully aware that the defense interposed was against a claim of fraud and was also aware of the nature of the defense and whether it was substantial or "captious and vexatious" long before the decision in *Hughes*. Moreover, *Hughes* does not discuss *Barnes* and *Robinson* or the exception to the rule of payment when the defense is captious or vexatious.

No authority is cited by the Receiver that would indicate that an attorney defending a fraud case in good faith is not within the rule of *Barnes* and *Robinson*. It would be monstrous to penalize an attorney for defending in good faith an unproven claim of fraud no matter how heinous the charge might be. The fact that fraud was charged does not *per se* constitute an exception from *Barnes* and *Robinson*.

The Receiver-Appellee asserts (p. 20) that "it was not a *debatable* question" as to whether defendant corporations had perpetrated frauds in violation of 10(b) of the Securities Exchange Act and 17 of the Securities Act and

had sold unregistered securities in violation of 5(a) of the Securities Act.

Nothing could be further from the truth.

The voluminous record and exhibits clearly indicate that defendants vigorously contested every charge of violation of the Securities laws. Indeed, the District Court could not have found that Appellant's services were "of high order" if seven trial days and lengthy briefs, motions and arguments had been wasted in presenting the District Court with defenses to "non-debatable" questions.

The findings made by the District Court which are summarized on pages 6-8 of the Receiver-Appellee's Brief were based on conflicting proof and were never admitted by defendants.

Finally, events subsequent to 1970 have borne out the fiscal theory from which the charge of fraud arose. The then fantastic prediction that interest rates on United States Government Securities would rise from less than 4% to over 9% and the Dow-Jones stock averages would plummet from over 1000 to less than 600 has already occurred. Indeed, if there had been no receivership the defendants' customers might now have realized a substantial profit instead of the loss they incurred as a result of the forcible liquidation of their investment.

Only the District Court which tried the case, heard the witnesses and examined the documents, can determine whether Appellant presented a captious and vexatious defense. The District Court's reference to the "high order" of Appellant's services would seem to settle the matter.

Respectfully submitted

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Of Counsel

(57165)

375—Affidavit of Service

The Reporter Co., Inc., 11 Park Place, New York,

UNITED STATES COURT OF APPEALS ::: FOR THE SECOND CIRC

S.E.C.,
plaintiff-Appellee,

v.

Capital Counsellor, Inc. et al
...
Conboy, et al
appellant,

Wertheimer,
receiver-appellee

AFFI
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STATE OF NEW YORK,
COUNTY OF New York , ss:

Harold dudash being duly

deposes and says that he is over the age of 21 years and resides at 2530
Bronx,

That on the 12th day of december 19 74 at new yrok,

he served the annexed Reply brief of Cobiy, Hewitt, O'Brien & Boardman, A

upon: Leon Leighton, 6 E. 45th St. NY, NY.

in this action, by delivering to and leaving with said attorney

three true cop

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to

person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 12th
day of december 19 74

Harold

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1975

N. Y. 10007

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Attorney for

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